JAN 26 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1031

WALTER KOCHER a/k/a WALTER A. KOCHER
and ROSE KOCHER,

Petitioners,

—against—

UNITED STATES OF AMERICA; COMMERCIAL BANK OF SOLEURE;
ERIC KOCHER; and STATE TAX COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD S. BENTLEY
Counsel for Petitioners
Office & Post Office Address
20 Exchange Place
New York, N. Y. 10005

E. GAYLE MCGUIGAN
Office & Post Office Address
McGuigan & Kilcullen
233 Broadway
New York, N. Y. 10007

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutes Which the Case Involves	3
Statement of the Case	5
Nature of the Action	5
The Facts	5
The Judgment of the District Court	6
The Opinion Below	7
The Reasons Relied on for Granting the Writ	8
The Basis of Jurisdiction in the District Court	8
ARGUMENT—	
1. The Decision of the Court of Appeals for the Second Circuit Is in Conflict With the Decision of the Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.*, 306 F. 2d 361 (1962)	8
2. The Decision of the Court of Appeals for the Second Circuit Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court	10
(a) As to the question whether the sale on foreclosure may be of the property in its entirety or only of the interest of the taxpayer in it	10

PAGE

(b) As to the question of the Government's right to bid on the foreclosure sale 12

CONCLUSION 15

APPENDIX—

Opinion of the Court of Appeals 1a
Judgment of the Court of Appeals 14a
Opinion of the District Court 16a
Judgment of the District Court 21a

CITATIONS

Cases:

Central Hanover Bank & Trust Co. v. Commissioner, 159 F. 2d 167 (2nd Cir. 1947) 12

Dimmick v. First National Bank of Montgomery, 228 Ala 150, 153 So. 207 (1934) 9

Folsom v. United States, 306 F. 2d 361 (5th Cir. 1961) 7, 8, 9

The Country Club Land Association v. Lohbauer, 187 N.Y. 106 (1907) 9

United States v. Gurley, 415 F. 2d 144 (5th Cir. 1969) 9
United States v. Overman, 424 F. 2d 1142 (9th Cir. 1970) 7, 9
United States v. Trilling, 328 F. 2d 699 (7th Cir. 1964) 7, 9

Washington v. United States, 402 F. 2d 3 (4th Cir. 1968), cert. denied 402 U.S. 978 (1971) 7, 9
Wood v. Phillips, 43 N.Y. 152 (1870) 9

PAGE

Textbooks:

Rasch, The New York Law and Practice of Real Property (1962), Volumes I & III, §§ 580, 2124, 2205, and 2258 9

Statutes:

Internal Revenue Code of 1954:

Section 6321 (26 U.S.C. 1964 ed., Section 6321; Aug. 16, 1954, c. 736, 68A. Stat. 779) 3, 12

Section 7401, (26 U.S.C. 1964 ed., Section 7403; Aug. 16, 1954, c. 736, 68A. Stat. 873) 8

Section 7402 (26 U.S.C. 1964 ed., Section 7402; Aug. 16, 1954, c. 736, 68A. Stat. 873, Nov. 2, 1966, Pub. L. 89-719, Title I, § 107(a), 80 Stat. 1140) 8

Section 7403 (26 U.S.C. 1964 ed., Section 7403; Aug. 16, 1954, c. 736, 68A. Stat. 874; Nov. 2, 1966, Pub. L. 89-719, Title I, § 107(b), 80 Stat. 1140) 2, 3, 8, 10, 11, 12, 13

Title 28 U.S.C. 1958 ed., Section 1340 (June 25, 1948, c. 646, 62 Stat. 932) 8

Title 28 U.S.C. 1958 ed., Section 1345 (June 25, 1948, c. 646, 62 Stat. 933) 8

Title 31 U.S.C. 1952 ed., Section 195 (R.S. § 3470; May 10, 1934, 11:40 a.m., c. 277, § 512, 48 Stat. 758, as amended June 2, 1965, Pub. L. 89-30, § 5, 79 Stat. 119) 3, 4, 5, 13

Miscellaneous:

S. Rep. No. 1708, 89th Cong., 2d Sess., in U.S. Cong. & Ad. News 3722, 3747 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

WALTER KOCHER a/k/a WALTER A. KOCHER
and ROSE KOCHER,

Petitioners,

—against—

UNITED STATES OF AMERICA; COMMERCIAL BANK OF SOLEURE;
ERIC KOCHER; and STATE TAX COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 30, 1972, affirming a judgment of the United States District Court for the Southern District of New York entered in the above case on November 19, 1971.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 329 F. Supp. 1079. The opinion of the United States Court of Appeals for the Second Circuit is reported at 368 F. 2d 503.

The opinion of the District Court is included in the appendix to this petition on pages 16a-20a. The opinion of

the Court of Appeals is included in the appendix to this petition on pages 1a-13a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit is dated, and was entered on, October 30, 1972. The judgment of the United States District Court for the Southern District of New York is dated, and was entered on, November 19, 1971. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

Questions Presented for Review

The two ultimate questions presented for review are:

1. Whether, where a taxpayer and his wife own real property in the State of New York as tenants in common, a judgment of foreclosure, pursuant to Section 7403 of the Internal Revenue Code (26 U.S.C. §7403) of liens for United States income taxes owed by the taxpayer alone may order sale of the property in its entirety, including the wife's interest therein, or only sale of the interest therein of the taxpayer.

2. Whether, where such liens for income tax are not first liens, the judgment of foreclosure may provide that the Government may purchase the property on the foreclosure sale, and may so provide without limiting the amount to be bid to the amount of the liens plus the expenses of sale.

The questions are those of interpretation of said Section 7403 of the Internal Revenue Code and of 26 U.S.C. §195.

Statutes Which the Case Involves

The statutes involved are Sections 6321 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C. §§6321 and 7403) and Section 195 of Title 31 U.S.C. Said statutes are set out verbatim below:

Section 6321, Internal Revenue Code (26 U.S.C. §6321):

§ 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Aug. 16, 1954, c. 736, 68A Stat. 779.

Section 7403, Internal Revenue Code (26 U.S.C. §7403):

§ 7403. Action to enforce lien or to subject property to payment of tax

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity. Aug. 16, 1954, c. 736, 68A Stat. 874; Nov. 2, 1966, Pub.L. 89-719, Title I, § 107(b), 80 Stat. 1140.

Section 195, Title 31 U.S.C.:

§ 195. Purchase on execution

At every sale, on execution, at the suit of the United States, of lands or tenements of a debtor, the United States may, by such agent as the head of the department or independent agency at whose instance suit was

instituted shall appoint, become the purchaser thereof; but in no case shall the agent bid in behalf of the United States a greater amount than that of the judgment for which such estate may be exposed to sale, and the costs. Whenever such purchase is made, the marshal of the district in which the sale is held shall make all needful conveyances, assignments, or transfers to the United States. R.S. §3470; May 10, 1934, 11:40 a.m. c. 277, § 512, 48 Stat. 758, as amended June 2, 1965, Pub.L. 89-30, § 5, 79 Stat. 119.

Statement of the Case

Nature of the Action

This is an action pursuant to Section 7403 of the Internal Revenue Code to foreclose liens for additional income taxes, and assessed interest, for the years 1943 to 1947 inclusive. The liens arose in 1955, 1959, and 1960, when the additional taxes were assessed. They are on the interests of petitioner Walter Kocher in real property in Tarrytown, New York owned by him and his wife, petitioner Rose Kocher, as tenants in common. The taxes are owed by Mr. Kocher only. The action seeks sale on foreclosure of the property in its entirety, as opposed to a sale merely of Mr. Kocher's interest in it. (R. 26, 30, 31) The tax liens are not first liens; there are four mortgage liens that are prior to them. (R. 24, 48, 58)

The Facts

The property on which foreclosure is sought consists of ten parcels of land assembled by Mr. and Mrs. Kocher in the years 1944 to 1946. Five parcels, constituting a single tract, were acquired in 1944 and 1945 by deeds running to Mr. and Mrs. Kocher as tenants by the entirety. (R. 24, 48)

These parcels are denominated the "Homestead Parcels" since Mr. and Mrs. Kocher live there. The other five parcels, denominated the "Disputed Parcels" because of the issue referred to below, constitute another single tract adjacent to the Homestead Parcels and were acquired in 1946 by deeds running to Mr. Kocher alone. (R. 24, 48) In October 1961, at the request of the Government, Mr. and Mrs. Kocher executed a deed of all ten parcels to themselves as tenants in common to protect the Government against the event that Mr. Kocher would predecease his wife so that, as a tenant by the entirety, she would succeed to the property, by operation of law, free of the tax liens. (R. 48)

The Government moved for partial summary judgment of foreclosure with respect to the Homestead Parcels which was granted by the judgment that was affirmed in the judgment of the Court of Appeals of which review is here sought. (R. 58) The action continues with respect to the Disputed Parcels because of an issue whether (a) those parcels were acquired for a partnership of which Mr. and Mrs. Kocher were the members, so that her interest was acquired before and is, therefore, free of the Government's liens, or (b) Mrs. Kocher's interest, acquired of record by the October 1961 deeds after those liens were filed, came to her burdened with those liens. (R. 52, 58, 64)

The Judgment of the District Court

The judgment of the District Court orders that what shall be sold on the foreclosure sale is the Homestead Parcels in their entirety, not just Mr. Kocher's interest in them. It also orders that the property be sold subject to the prior mortgages.

The Opinion Below

In its opinion, the Court of Appeals (a) held that Section 7403 of the Internal Revenue Code literally provides for the sale of any property in which the delinquent taxpayer has any interest, with the proceeds to be distributed according to the interests of the parties, (b) rejected any reason for requiring any construction other than the literal one, (c) rejected the decision of the Court of Appeals for the Fifth Circuit in *Folsom* v. *United States,* 306 F. 2d 361 (1962) and (d) followed the decisions of the Seventh Circuit in *United States* v. *Trilling,* 328 F. 2d 699 (1964), the Fourth Circuit in *United States* v. *Washington,* 402 F. 2d 3 (1968) cert. denied 402 U.S. 978 (1971) and the Ninth Circuit in *United States* v. *Overman,* 424 F. 2d 1142 (1970).

On the question whether the Government should be permitted to bid on the foreclosure sale, the Court of Appeals held that the provision of Section 7403 of the Internal Revenue Code that "If the property is sold to satisfy a first lien held by the United States, the United States may bid on the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs" limits the Government's bid only where the Government is a senior lienor not where, as here, it is a junior lienor. It also held that Section 7403 should be construed together with 31 U.S.C. §195 which provides that on execution sales at the suit of the United States the United States may become a purchaser, but that its bid must be limited to the amount of "the judgment for which such estate may be exposed to sale, and the costs." It said that in a tax lien foreclosure action such judgment would include the amounts of any senior liens being foreclosed, and thus the permissible bid would exceed the amount of the tax liens. (In fact the judgment here is for sale subject to the senior liens, and does not foreclose them.)

The Reasons Relied on For Granting the Writ

This petition for a writ of certiorari is on the grounds set out in Rule 19-1(b) of the Rules of this Court. It is submitted that the decision of the Court of Appeals for the Second Circuit (a) is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.*, 306 F. 2d 361 (C.A. 5th 1961), and (b) decided two important questions of federal law—the questions presented for review—which have not been, but should be, settled by this Court.

The Basis of Jurisdiction in the District Court

Jurisdiction in the United States District Court for the Southern District of New York in this case is based on Sections 1340 and 1345 of Title 28 U.S.C. and Sections 7401, 7402, and 7403 of Title 26 U.S.C., the action being one arising under the Internal Revenue laws of the United States and being one in which the United States is the plaintiff.

ARGUMENT

1. The Decision of the Court of Appeals for the Second Circuit Is in Conflict With the Decision of the Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.* 306 F 2d 361 (1962).

There can be no question that the decision of the Court of Appeals for the Second Circuit is in direct conflict with that of the Court of Appeals for the Fifth Circuit in *Folsom* v. *U.S.*, 306 F. 2d 361 (1962). Both cases involve liens for federal income taxes owed by only one of two or more tenants in common of real property. In both cases the Government sought sale on foreclosure of the property in

its entirety, as opposed to a sale of only the taxpayer's interest therein. In both, local law (a) gave the non-taxpayer party or parties the right to undisturbed possession until a sale or a partition in kind pursuant to a judgment in a partition action brought by a proper party and (b) provided that in the event of such an action, the property should be partitioned in kind rather than sold if that could be accomplished in an equitable fashion. Rasch, The New York Law and Practice of Real Property, §§580, 2124, 2205, and 2258; *Wood* v. *Phillips,* 43 N.Y. 152 (1870); *The Country Club Land Association* v. *Lohbauer,* 187 N.Y. 106 (1907); *Folsom* v. *United States,* 306 F. 2d 361 (5th Cir. 1969). *Dimmick* v. *First National Bank of Montgomery,* 228 Ala. 150, 153 So. 207 (1934).

The decision of the Court of Appeals for the Second Circuit is supported, it is true, by decisions of the Court of Appeals for the Seventh Circuit in *U.S.* v. *Trilling,* 328 F. 2d 699 (1964), the Court of Appeals for the Fourth Circuit in *Washington* v. *United States,* 402 F. 2d 3 (1968) and the Court of Appeals for the Ninth Circuit in *United States* v. *Overman,* 424 F. 2d 1142 (1970); and this court denied certiorari in *Washington* v. *United States,* 402 U.S. 978 (1971) where the interest in the property of the non-taxpayer party was an inchoate dower interest. However, the conflict remains, and in 1969 the Circuit Court for the Fifth Circuit in *United States* v. *Gurley,* 415 F. 2d 144 cited its decision in *Folsom* v. *United States* with approval.

We submit that, for the reasons set out below, the question involved is an important one and that the conflict in the Circuits is reason for a review by this Court even though the Circuits are not evenly divided.

2. The Decision of the Court of Appeals for the Second Circuit Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

It is submitted that both questions decided below by the Court of Appeals for the Second Circuit are important questions of federal law which have not been, but which should be, decided by this Court.

(a) ***As to the question whether the sale on foreclosure may be of the property in its entirety or only of the interest of the taxpayer in it.***

The decision of the Court of Appeals that Section 7403 of the Internal Revenue Code permits a sale on foreclosure of the property in its entirety, not merely of the taxpayer's interest in it, is a decision of a question of federal law. That it is an important question is shown, it is submitted, by the fact that the interpretation adopted below is of general application and this means that if it is permitted to stand then in any tax lien foreclosure action sales of the property as an entirety would be permitted regardless of what or how limited is the interest that the taxpayer has in it. Thus such a sale would be permitted where the taxpayer is merely a tenant, perhaps of a few rooms in a great office building. Under established principles of property law, he would have an "interest" in the building and the interpretation given to Section 7403 below would permit sale of the entire building on a foreclosure of tax liens against him. Again such a sale would be permitted where the only interest of the taxpayer in the property is as a mortgagee, and where the owner never has been, and never will be, delinquent in meeting the mortgage payments. Here again, at least in title states, the mortgagee would have an "interest" in the property. Finally such a sale would be permitted when the

taxpayer is a tenant in common of the property as here, but holds only an undivided one percent interest instead of an undivided fifty percent interest.

This Court has not passed on this question. That it should is shown, it is submitted, by the startling consequences of the interpretation made below that are suggested above, and because such an interpretation is not at all required by the language of the statute.

The Court below, like the courts of the Fourth, Seventh, and Ninth Circuits, reached its result by a mechanical and literal reading of Section 7403 of the Internal Revenue Code. That Section in subsection (a) provides that the Attorney General, or his delegate, may bring an action "to subject any property . . . of the delinquent [taxpayer] or in which he has any right, title or interest to the payment of such tax or liability", and in subsection (b) provides for making parties to such action all persons claiming any interest in "the property", and in subsection (c) provides that where a claim or interest of the United States in "the property" is established, the Court may decree a "sale of such property." This reading makes the antecedent of "such property" in subsection (c) not only property "of" the delinquent, but also property "in which he has any right, title or interest."

Such a reading treats words as though they are immutable symbols, each with a single, narrow meaning, and as though the statute were a mathematical formula using such symbols. That such an approach is probably wrong, and should be reviewed by this Court, is compellingly suggested by the fact that the same approach would require the provision of the Section that the Attorney General or his delegate may bring an action to "subject" to the "payment" of the tax "any property . . . of the delinquent, or in which he has any right, title or interest" to be interpreted

to allow the entire property to be taken to pay the tax even though others had a substantial interest in the property.

It is submitted that such a literal, mathematical interpretation is not required. Interests in property are themselves "property" and are thus perfectly idiomatic antecedents for the phrase "such property" in subsection (c) of the statute.

In short it is submitted that Section 7403 is not so nicely drawn that a literal mathematical reading of it may be safely relied on. As Judge Learned Hand said in *Central Hanover Bank & Trust Co.* v. *Commissioner,* 159 F.2d 167, 169 (2d Cir. 1947)

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure."

Under Section 6321 of the Internal Revenue Code (26 U.S.C. 6321) the Government's tax lien attaches to only property and rights to property "belonging" to the taxpayer, not to the whole property in which he has some rights, and Section 7403 of the Internal Revenue Code is manifestly designed to permit enforcement of that lien, not to expand it.

(b) ***As to the question of the Government's right to bid on the foreclosure sale.***

As the opinion of the Court of Appeals states, the question whether under Section 7403 of the Internal Revenue Code the Government should be permitted to bid on the foreclosure sale and, if so, to bid more than the amount of its lien and the expenses of sale, is one that is of first impression in any court. The Circuit Court's support of

its holding that the Government may so bid by reading Section 7403 together with Section 195 of 31 U.S.C. (which applies to sales on execution, not foreclosure sales) is also without precedent, as the Court of Appeals itself points out. The question in each case is, of course, one of federal law.

Section 7403 is the general statute governing enforcement of liens for federal taxes. Section 195 is of general application to sales on execution at the suit of the United States. Both are manifestly important, as is their proper interpretation.

It is submitted that this Court should pass on these questions of the interpretation of these statutes since the interpretation given by the Court of Appeals does violence to what seems clearly expressed Congressional policy, and whether it does such violence should be settled by this Court.

The applicable part of Section 7403 reads "If the property is sold to satisfy a first lien held by the United States, the United States may bid on the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs."

This provision was added to the statute in 1966 (Act of November 2, 1966, Pub. L. No. 89-719, Tit. I, § 170(b), 80 Stat. 1140). The only legislative report found on it is that of the Senate Committee which said:

> "Where property is sold at a tax lien foreclosure sale, the Internal Revenue Code contains no specific authority authorizing the Federal Government to bid at these sales where it believes that less than full consideration is being offered for the property. Such authority is contained elsewhere, however, in the public statutes (see sec. 195 of title 31 of the United States Code).

It is desirable for the Federal Government to bid in property to prevent its sale at distress prices in order to assure that the Government receives the full value of the property sold or the amount of the Government's tax claim, as well as to protect the interests of the delinquent taxpayer whose property is being sold.

For the reason indicated above, the bill codifies the rule that where the Government brings an action to enforce a tax lien, the Government can bid on the property where the Government holds a first lien. The amount which it may bid under the bill is limited to the amount of its lien, plus selling expenses. Whether or not the Government exercises this authority to bid within the limit set forth in the bill is a matter within the discretion of the Treasury Department." (S. Rep. No. 1708, 89th Cong., 2d Sess., in 1966 U.S. Cong. & Ad. News 3722, 3747).

We submit that the language of this report and the language of both Section 7403 of the Internal Revenue Code and of Section 195 of Title 31 U.S.C. indicate that it is an important part of Congressional policy that public money shall not be used to provide cash to pay off private lienors and therefore that the Government may bid only when cancellation or credit against the debt to the Government may be the medium of payment of the bid. But using public money to provide cash to pay off private lienors is just what occurs when the Government bids on sales where it is a junior lienor and prior private liens are also being foreclosed. Some of the money bid goes to pay off the prior lienors.

This policy is equally violated by using public money to purchase property subject to prior liens, as in the present case, since then the Government is placed in the position

of having to use additional public money to service, or protect against foreclosure of, those prior liens.

Moreover, under the judgment sustained below, half of the amount bid by the Government will have to be paid in cash to Mrs. Kocher so that she can receive the proceeds attributable to her interest in the property, which is not subject to the tax liens. Accordingly, the policy is violated even though the tax liens have in effect become first liens since the sale is to be subject to the prior liens.

In all events, it is submitted that both statutes require the bid to be limited to the amount of the tax lien. Section 195 applies to sales "on execution" at the suit of the United States and the judgment referred to must be a money judgment in favor of the United States—not one in favor of the United States and prior lienors.

CONCLUSION

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the decision below.

Respectfully submitted,

EDWARD S. BENTLEY
Counsel for Petitioners
Office & Post Office Address
20 Exchange Place
New York, N. Y. 10005

E. GAYLE MCGUIGAN
Office & Post Office Address
McGuigan & Kilcullen
233 Broadway
New York, N. Y. 10007

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 24—September Term, 1972.

(Argued October 2, 1972 Decided October 30, 1972.)

Docket No. 72-1163

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

WALTER KOCHER, a/k/a WALTER A. KOCHER, and ROSE KOCHER,

Defendants-Appellants,

and

COMMERCIAL BANK OF SOLEURE; ERIC KOCHER; HAROLD MILLER; WALLACE J. SCOTT; STATE TAX COMMISSION; and MORRIS A. KAPLAN,

Defendants.

Before:

MOORE, FEINBERG and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge,* granting partial summary judgment of foreclosure of tax liens in action brought by the United

States to secure an adjudication of indebtedness for federal taxes and to foreclose tax liens on taxpayer's real property interests.

Judgment affirmed.

E. GAYLE MCGUIGAN, New York, N.Y. (McGuigan & Kilcullen, New York, N.Y.), *for Defendants-Appellants.*

GERALD A. ROSENBERG, Asst. U.S. Attorney, New York, N.Y. (Whitney North Seymour, Jr., U.S. Attorney, Yale L. Rosenberg and Michael I. Saltzman, Asst. U.S. Attorneys, New York, N.Y., of Counsel), *for Appellee.*

MULLIGAN, *Circuit Judge*:

This is an appeal from a partial summary judgment rendered by Hon. Charles M. Metzner, United States District Judge, Southern District of New York, May 10, 1971. Judge Metzner's opinion is reported in 329 F. Supp. 1079 (S.D.N.Y. 1971). Judgment affirmed.

This action was brought by the United States on June 24, 1965 to secure an adjudication of indebtedness for federal income taxes and to foreclose tax liens on real property located in the Village of Tarrytown, Westchester County, New York. The Government's first motion for partial summary judgment sought a decree that the taxpayer (Mr. Kocher) was indebted to the United States for unpaid, assessed income taxes, plus assessed interest for the years 1943-47 in the total amount of $275,863.31, plus interest thereon according to law. The motion was unopposed and entry of the judgment dated November 23, 1970 was consented to by counsel for the taxpayer. The total amount of adjudicated indebtedness including interest to January

2, 1971 was $500,590.07 with interest accruing thereafter at the rate of $44.14 per diem. The Government then moved for summary judgment of foreclosure. The property on which foreclosure was sought consists of ten parcels of land. Five parcels, denominated the Homestead Parcels since Mr. and Mrs. Kocher live there, were acquired by the Kochers in 1944 and 1945 by deeds running to Mr. and Mrs. Kocher, as tenants by the entirety. The other five parcels (the "Disputed Parcels") were acquired in 1946 by deed running to Mr. Kocher alone. In October, 1961, at the request of the Government, the Kochers executed deeds of all ten parcels to themselves as tenants in common in order to defeat in the event of Kocher's demise, succession to the property by his widow, by operation of law, free of any tax lien.

In opposition to the motion for summary judgment, the Kochers maintained that there was newly discovered evidence with respect to the Disputed Parcels which would indicate that Mrs. Kocher's interest in them arose before the tax lien by virtue of a partnership agreement entered into between the husband and wife in 1946. Since the Government did not have time to investigate these allegations, the motion for full summary judgment was withdrawn and a motion for partial summary judgment to foreclose only with respect to the Homestead Parcels was made. The District Court granted this judgment which (a) permitted the United States to sell the Homestead Parcels in their entirety as opposed to a sale of only the taxpayer's interest therein[1] (b) permits the United States

[1] There is no dispute that the federal tax liens are junior to mortgages held by the defendant Commercial Bank of Soleure and the defendant Eric Kocher. The judgment provides that the property will be sold subject to mortgages which are senior to the United States tax liens. It is also undisputed that if the Government is

to bid at the foreclosure sale and (c) certified pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay and directed that final judgment be entered forthwith. The appellants urge that each of these determinations was erroneous as a matter of law.

(a) *May the Government enforce its lien by selling the Homestead Parcels or is it limited to a sale only of Mr. Kocher's undivided half interest in the property?*

This is a question of first impression in this Circuit and involves an interpretation of Section 7403 of the Internal Revenue Code, 26 U.S.C. § 7403 (1970).[2] There is

---

permitted to sell the property as distinguished from Mr. Kocher's interest therein, the proceeds after the expenses, and the costs of foreclosure, are to be shared equally between Mrs. Kocher and the United States.

[2] Section 7403 provides:

(a) Filing.

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability *or to subject any property, of whatever nature of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.*

(b) Parties.

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, *may decree a sale of such property,* by the proper officer of the court, *and a*

no question but that the statute literally provides for the sale of any property in which the delinquent taxpayer has any interest, with the proceeds to be distributed according to the interests of the parties.[3] Appellants admit that if the statute is to be literally applied, there is no escape from the position taken by the Government and adopted in Judge Metzner's opinion below. There is no doubt either that Mr. Kocher's interest in the property as a tenant in common is to be determined by state law, but that the manner of enforcement of the lien is to be governed by federal law. *Aquilino* v. *United States*, 363 U.S. 509, 512-14 (1960); *United States* v. *Bess*, 357 U.S. 51, 55 (1958). While the New York law provides for a sale by a tenant in common only if it appears that a partition in kind cannot be made without great prejudice to the owners (N.Y. Real Prop. Actions Law § 901(1) (McKinney 1963)), the section refers only to actions brought by tenants in common *inter sese* and does not purport to affect a sale by virtue of a tax lien in favor of the United States, the enforcement of which is properly determined by federal law.

---

distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

(d) Receivership.

In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity. (Emphasis added)

[3] Section 7403(b), supra note 2, requires all persons having liens or claiming any interest in the property be made parties to the action which has been accomplished in this case.

Appellant's principal reliance for escape from the literal language of Section 7403 is upon *Folsom* v. *United States*, 306 F.2d 361 (5th Cir. 1962) which held that the Government, as a lien holder, did not have the right under Section 7403 to force a sale of property in which a tax delinquent had an undivided one-sixth interest. This, in the view of that court, denied the right of the other five joint owners to seek a partition in kind under Alabama law. That court would require the Government to acquire only the undivided interest of the delinquent and then to exercise whatever property rights such joint owners might exercise under state law.

We cannot agree with the *Folsom* decision because in our opinion it overlooks the principles of *Aquilino and Bess*, which teach that although we look to state law to determine what interest, if any, the taxpayer has in the property, the manner of enforcement of the lien is then to be determined by federal law. The holding in *Folsom* was specifically rejected by the Seventh Circuit in *United States* v. *Trilling*, 328 F.2d 699 (7th Cir. 1964), which permitted the sale of property owned jointly by husband and wife and rejected the proposition that the sale should be limited to the tax delinquent husband's joint interest. The *Trilling* decision has been followed in *United States* v. *Washington*, 402 F.2d 3 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971), and *United States* v. *Overman*, 424 F.2d 1142 (9th Cir. 1970).

The sale of the property pursuant to the statute not only eliminates the necessity of the United States bringing two lawsuits (acquiring the tenancy and then selling it) but obviously will result in a greater financial return to the Government, the taxpayer and his wife. It is apparent that a bidder would pay considerably less for an undivided

interest in the Homestead Parcels in which he presumably could have no realistic expectation to possess in common with the remaining tenant, Mrs. Kocher. He would in effect be purchasing a partition action and another sale. In any event, we cannot do more than to construe the language of Congress and we cannot assume that the statute authorizing the sale of the property in which the taxpayer has an interest was mistakenly or arbitrarily selected. *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965).

(b) *May the United States be permitted to bid at the foreclosure sale?*

In his judgment below, Judge Metzner detailed the terms and conditions of the sale fixing the amounts due and the priorities to be observed. The property is to be sold subject to the senior mortgage liens of the Commercial Bank of Soleure and Eric Kocher. The order specifically provides that the Internal Revenue Service might purchase the property. Appellant contends that Section 7403(c) (supra note 2) prohibits the United States from bidding except when it holds a first lien and then it may only bid in a sum not exceeding the amount of such senior lien plus the expenses of sale. Since the Government is concededly a junior lienor here, the argument runs, the judgment permitting it to purchase is erroneous and reversible.

We cannot accept this construction of the statute. The last sentence of Section 7403(c), which is at issue here, was added in 1966 (Act of Nov. 2, 1966, Pub. L. No. 89-719, Tit. I, § 107(b), 80 Stat. 1140), and no case construing it has been cited to us or discovered in our research. The purpose of the amendment is made clear, however, by the report of the Senate Committee.

Where property is sold at a tax lien foreclosure sale, the Internal Revenue Code contains no specific authority authorizing the Federal Government to bid at these sales where it believes that less than full consideration is being offered for the property. Such authority is contained elsewhere, however, in the public statutes (see sec. 195 of title 31 of the United States Code).

It is desirable for the Federal Government to bid in property to prevent its sale at distress prices in order to assure that the Government receives the full value of the property sold or the amount of the Government's tax claim, as well as to protect the interests of the delinquent taxpayer whose property is being sold.

For the reason indicated above, the bill codifies the rule that where the Government brings an action to enforce a tax lien, the Government can bid on the property where the Government holds a first lien. The amount which it may bid under the bill is limited to the amount of its lien, plus selling expenses. Whether or not the Government exercises this authority to bid within the limit set forth in the bill is a matter within the discretion of the Treasury Department. (S. Rep. No. 1708, 89th Cong., 2d Sess., in 1966 U.S. Cong. & Ad. News 3722, 3747).

It is thus evident that the intent of Congress was to prevent the sale of property at distress prices in order to assure that the Government gets full value as well as to protect the interests of the delinquent taxpayer. It is further evident that whether the Government lien is junior or senior bears no relationship to the possibility of a dis-

tress sale which could be financially disastrous for both the Government and the taxpayer. Reading the statute to permit bidding solely when the Government is a senior lienor, therefore, is not sensible or logical and we can only read it to mean that only where the Government is the senior lienor, is its bid limited as provided; this presumably protects the Government's interest and maximizes the taxpayer's protection. However, where the Government is a junior lienor, it certainly may bid but without the limitation contained in Section 7403(c).

As the Senate Report indicates, the Internal Revenue Code had previously contained no specific authority permitting Government bidding at a tax foreclosure sale where it believed that less than full value was being offered for the property. It could hardly be contended that prior to 1966 the Government could not purchase property at a tax foreclosure sale under appropriate circumstances. As the report points out, the authority for Government bidding is contained elsewhere in the public statutes, to wit, 31 U.S.C. § 195 (1970), which was derived from a statute[4] enacted in 1824. Section 195 specifically provides[5] that the United States may become the purchaser at every sale on execution of the lands of a debtor.

---

[4] Act of May 26, 1824, ch. 172, §2, 4 Stat. 51.

[5] Section 195 provides:

> At every sale, on execution, at the suit of the United States, of lands or tenements of a debtor, the United States may, by such agent as the head of the department or independent agency at whose instance suit was instituted shall appoint, become the purchaser thereof; but in no case shall the agent bid in behalf of the United States a greater amount than that of the judgment for which such estate may be exposed to sale, and the costs. Whenever such purchase is made, the marshal of the district in which the sale is held shall make all needful conveyances, assignments, or transfers to the United States.

It must also be observed that this section limits the bid to that of the "judgment for which such estate may be exposed to sale." Since Section 7403(c) specifically permits the court to determine finally the merits of all claims and liens upon the property, the judgment for which each estate may be exposed for sale would include, where the United States is a junior lienor, the amounts of the senior liens being foreclosed. Hence the limitation imposed by Section 7403(c) where the Government is a senior or first lienor are not applicable when the Government is a junior lienor. In that case under Section 195, its bid could be increased to include the amounts of any senior liens which would be within the judgment. While these statutes have not been construed together before so far as our research indicates, this interpretation is consistent with their language and purpose. We see no point at all in placing any limitation on the Government's bid in the judgment below in view of the circumstances of this sale. The property to be sold is valued for sale purposes at approximately $400,000. The sale is made subject to the senior mortgage liens which total approximately $181,000 and which will not be foreclosed. The Government tax lien exceeds $500,000. Under these conditions it would be totally unrealistic to suppose that the United States would purchase the property for more than its lien.

(c) *Was the certification of the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure proper?*

Appellants argue that Judge Metzner improperly directed the entry of a final judgment with respect to the Homestead Parcels because Rule 54(b) permitting such procedure is only applicable where there is no more than one claim for relief presented. Appellant urges that here

there is only a single claim for relief—foreclosure of tax liens covering all ten parcels, both the Homestead and the Disputed Parcels, and further, that the tax delinquency was determined in a single settlement entered into in 1960 between the Government and the taxpayer.

The fact that the tax liability of Kocher was determined in a single transaction does not at all preclude the claimant from pressing multiple claims for relief. The "differing occurrences or transactions" test for appealability under Rule 54(b) was deleted by the 1946 amendments to Rule 54(b) which eliminated the "same transaction or occurrence" language. The Supreme Court in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956), rejected the original concept that there could not be multiple claims arising from a single occurrence or transaction. This Circuit has also repudiated this approach. *Campbell* v. *Westmoreland Farm, Inc.*, 403 F.2d 939 (1968). This case makes the test whether or not there are a number of different claims which could have been separately enforced. 403 F.2d at 941. 26 U.S.C. § 6321 (1970) provides that federal tax liens cover "all property and rights to property . . . belonging to [the taxpayer]." Here the taxpayer has an interest in ten separate parcels —with respect to the Homestead Parcels his interest is unquestioned and partial summary judgment has been granted with respect to those. The Disputed Parcels present questions of fact and law not presented with respect to the Homestead Parcels. It would seem that if other real property is discovered and the foreclosure sale here fails to satisfy the tax deficiency, the Government would have further claims for relief against each such parcel. If the parcels were separately located in different federal judicial districts, it would seem obvious that as many claims to

relief by foreclosure in separate proceedings could be brought in different jurisdictions until the entire amount of the indebtedness could be collected. While the parcels here are physically contiguous this does not render the claims for relief, single.

There is no problem here of mutual exclusivity. The litigation with respect to the Disputed Parcels is now before Judge Metzner. In the event that a second foreclosure sale is decreed, the judgment can certainly provide that the Government's lien will be reduced by whatever amount is realized on the first sale of the Homestead Parcels.

Appellant further urges that even if multiple claims are presented within the meaning of Rule 54(b), it was error for the court to certify that there was "no just reason for delay." Appellant argues that the Court below should await the disposition of the action as to the Disputed Parcels. Appellant relies upon *United States* v. *Pollack*, 233 F. Supp. 775 (E.D.N.Y. 1964), aff'd, 370 F.2d 79 (2d Cir. 1966) to support its position. In *Pollack*, an innocent purchaser for full value acquired property which unknown to him was subject to a federal tax lien. The court directed the Government to first sell other property subject to the lien before selling that which had been acquired by the innocent purchaser. The case is, of course, distinguishable from the one before us. While in *Pollack* the innocent purchaser would, in effect, be paying the tax bill of the delinquent, Mrs. Kocher is protected by the judgment below which pays her one-half of the proceeds of the sale. Moreover, while the Government did seek summary judgment to foreclose on all of the properties claiming that Mr. Kocher was the sole owner of the Disputed Parcels when the tax lien attached, it was Mrs. Kocher who raised the issue of her partnership interest on the basis of documents discovered

in the "recesses" of the Kocher home on March 3, 1971, thus creating the Government request for partial summary judgment.

We are urged that since the Disputed Parcels are business properties and the Homestead Parcels include the home of Mr. and Mrs. Kocher, it is inequitable to decree their sale now. This appeal to the conscience of the court would be attractive were it not for the facts which underlie the present litigation and which persuade us without question that the Court below did not abuse its discretion. The tax delinquency here arose for the years 1943-1947; the settlement with the Government was made in 1960. The record contains a letter from Mr. Kocher dated July 12, 1960 in which he promised to liquidate all of his tax liability by the end of 1960. He specifically promised to sell his real estate in Tarrytown, New York. The taxes involved here with the accrual of interest amount to more than a half a million dollars and in more than 12 years the taxpayer has failed to pay and failed to sell. If the loss of the home of Mr. and Mrs. Kocher is threatened, it is not by virtue of unseemly haste on the part of the United States but rather an unseemly lack of concern on the part of the taxpayer.

We affirm.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of October one thousand nine hundred and seventy-two.

Present:

HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALTER KOCHER, a/k/a WALTER A. KOCHER; ROSE KOCHER, COMMERCIAL BANK OF SOLEURE, ERIC KOCHER, HAROLD MILLER, WALLACE J. SCOTT, STATE TAX COMMISSION; and MORRIS A. KAPLAN,

Defendants,

WALTER KOCHER and ROSE KOCHER,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—against—

WALTER KOCHER, a/k/a WALTER A. KOCHER, *et al.*,

Defendants.

APPEARANCES:

WHITNEY NORTH SEYMOUR, JR., United States Attorney, Southern District of New York, Attorney for plaintiff; YALE L. ROSENBERG, Assistant United States Attorney, Of Counsel.

McGUIGAN & KILCULLEN, of New York, N. Y., Attorneys for defendants Walter Kocher and Rose Kocher; E. GAYLE McGUIGAN, of New York, N. Y., Of Counsel.

GAREY & GAREY, of New York, N. Y., Attorneys for defendants Commercial Bank of Soleure and Eric Kocher.

METZNER, D. J.:

The government seeks partial summary judgment in its action to foreclose tax liens against the property of defendant Walter Kocher.

There is no dispute that the property known as Parcel 1, Parcel 2, Parcel 3, Plot 1 and Plot 2 is held by the taxpayer and his wife as tenants in common. The tax liens were

filed on January 13, 1961. On October 18, 1961 Kocher and his wife conveyed the property by a deed from themselves as tenants by the entirety to themselves as tenants in common. Mrs. Kocher has stated in an affidavit that she agreed to this procedure because her husband had an interest in the property, that he owed money on his taxes and it seemed fair that his interest be available to pay his debt.

The question for determination is whether the government is entitled to enforce its lien by selling the property, and after deducting the costs of foreclosure and prior liens, dividing the proceeds equally with Mrs. Kocher. Mrs. Kocher argues that only her husband's interest in the property may be sold.

The statute provides the procedure for the government to enforce its tax lien. 26 U.S.C. § 7403. Subsection (a) provides that the government may file a civil suit in a district court "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." We are dealing with such an action in this case.

Subsection (c) provides that the court shall determine the merits of all claims to and liens upon the property, and "may decree a sale of such property, . . . and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States."

I find no problem as to the interpretation of these provisions and their applicability to the case at bar. In the first place, federal law controls the enforcement of federal tax liens. *Aquilino* v. *United States*, 363 U.S. 509, 513-14 (1960); *United States* v. *Heasley*, 283 F.2d 422, 428 (8th Cir. 1960). The statutory language is plain that any prop-

erty in which a taxpayer has an interest may be the subject matter of the lawsuit to enforce payment of the tax. The entire property may be sold to achieve this purpose. However, the court fixes the respective interests of all parties concerned so that only that portion of the proceeds attributable to the taxpayer's interest is kept by the government.

The issue presented here has been discussed in several cases. In *United States* v. *Trilling,* 328 F.2d 699, 703 (7th Cir. 1964), the court said:

> "The express language of the statute negates any design or intent on the part of Congress to limit the reach of the statute to the 'interest' of the taxpayer as distinguished from the 'property' in which he has such 'interest.'"

In that case the court sustained a judgment authorizing the sale of real estate in which the taxpayer and his wife each had an undivided one-half interest, with the assessment of the costs and expenses equally divided between the co-owners. A similar result was reached where the taxpayer and his wife were joint tenants with right of survivorship. *United States* v. *Mosolowitz,* 269 F. Supp. 12 (D. Conn. 1967).

The next case dealt with the question whether § 7403 permitted the sale of the taxpayer's real estate free of his wife's inchoate dower interest. The court held that the wife's interest was subject to termination by the sale. *Washington* v. *United States,* 402 F.2d 3, 6-7 (4th Cir. 1968).

Finally, in *United States* v. *Overman,* 424 F.2d 1142, 1146 (9th Cir. 1970), the court, after finding an interest

of the taxpayer in community property to which the lien could attach, said,

> "Thus, the statute [§ 7403] contemplates that the district court may subject the interests of persons other than the taxpayer to an involuntary conversion during the course of enforcing the Government's lien on the delinquent taxpayer's interest in the same property."

The only case holding contrary to the above cases is *Folsom* v. *United States,* 306 F.2d 361 (5th Cir. 1962), which was the first to deal with the issue.

I would point out that if we adopt Mrs. Kocher's contention a completely unsatisfactory result would follow. The purchaser becomes a tenant in common with Mrs. Kocher, and then must reach an amicable settlement with her if he desires the entire property for his own use. Either prospect, buying out Mrs. Kocher or remaining as a tenant in common, can only cause a lesser price to be obtained for the interest than if the property is sold as a unit.

Reference is made to *United States* v. *Pollack,* 233 F. Supp. 775 (E.D.N.Y. 1964). Under the broadest reading of that case, it stands for the proposition that where there are two possible properties to which the government can look to satisfy its lien, the court should direct that it first be satisfied out of the property in which there is no other interest. The only problem with that case is its inapplicability to the facts in this one. There is other property which the government claims is owned solely by the taxpayer. However, Mrs. Kocher claims an undivided half interest in that property, and because of the necessity of trying that issue, the government only asks for partial summary judgment here.

The motion is granted. The application for relief pursuant to Fed. R. Civ. P. 54(b) is also granted.

Settle order in accordance with the above opinion and provide for the priority of lienholders as shown of record.

Dated: New York, N. Y.
May 10, 1971

CHARLES M. METZNER
U. S. D. J.

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

WALTER KOCHER, a/k/a WALTER A. KOCHER; ROSE KOCHER; COMMERCIAL BANK OF SOLEURE; ERIC KOCHER; HAROLD MILLER; WALLACE J. SCOTT; STATE TAX COMMISSION; and MORRIS A. KAPLAN,

Defendants.

Plaintiff United States of America having moved for partial summary judgment foreclosing its tax liens described in the Amended Complaint herein on the real property designated in Schedules A and B of the Amended Complaint as "Parcel No. 1," "Parcel No. 2," "Parcel No. 3," "First Plot," and "Second Plot" and described with particularity in said schedules, and this motion having come on to be heard before me on the 6th day of April, 1971, and Yale L. Rosenberg, Assistant United States Attorney, having appeared in support thereof, and E. Gayle McGuigan, Esq. and Wm. Francis Corson, Esq. having appeared in opposition thereto, and due deliberation having been had thereon, and partial summary judgment having been entered herein on November 4, 1970, decreeing that defendant Walter Kocher is indebted to the United States of America for unpaid assessed income taxes in the amount of $275,863.31 together with interest thereon

according to law and said amount and interest being the indebtedness secured by said tax liens,

Now, on motion of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, it is

ORDERED AND ADJUDGED that Plaintiff's federal income tax liens described in the Amended Complaint for $275,863.31 plus interest thereon according to law are hereby foreclosed, and that the premises designated in Schedules A and B of the Amended Complaint as "Parcel No. 1," "Parcel No. 2," "Parcel No. 3," "First Plot," and "Second Plot" and so designated and described with particularity in Schedules A and B annexed hereto and hereby made a part hereof shall be sold as provided below, subject to any state of facts that an actual survey or a personal inspection of the premises would disclose, subject to zoning ordinances, regulations of various governmental authorities having jurisdiction over the premises, and covenants and restrictions of record, and subject to the consolidated mortgage to defendant Commercial Bank of Soleure dated July 11, 1959, and recorded in the office of the Clerk of Westchester County in Liber 6088 Mp 314, Liber 6509 Mp 315, and Liber 7059 Mp 754, on which there remains an unpaid principal balance of $71,226.50 plus interest accrued to May 31, 1971 of $32,179.20 plus interest accrued thereafter at the rate of 6% per annum, the mortgage to said defendant Commercial Bank of Soleure dated January 8, 1960, and recorded in the office of the Clerk of Westchester County in Liber 6127 Mp 29, Liber 6127 Mp 27, and Liber 7059 Mp 749, on which there remains an unpaid principal balance of $35,000. plus interest accrued to May 31, 1971 of $3,494.20 plus interest accrued thereafter at the rate of

6% per annum, and the consolidated mortgage to defendant Eric Kocher dated March 13, 1957, and recorded in the office of the Clerk of Westchester County in Liber 5768 Mp 3, Liber 6963 Mp 329, and Liber 7059 Mp 766, on which there remains an unpaid principal balance of $35,000. plus interest accrued to May 31, 1971 of $4,544.20 plus interest accrued thereafter at the rate of 6% per annum, at public auction, at the steps of the Westchester County Court House, White Plains, New York, in accordance with the rules and practices of this Court and the provisions of 28 U.S.C. §§ 2001 and 2002, under the direction of the United States Marshal for the Southern District of New York, or his representative, and that said Marshal shall give public notice of the time and place of the sale according to law and the rules and practices of this Court; and it is further

ORDERED AND ADJUDGED that said premises shall be put up to be sold first in two separate lots, to wit, the first lot comprised of the parcel designated as "Parcel No. 1" in Schedule B annexed hereto and the two parcels designated as "First Plot" and "Second Plot" in Schedule A annexed hereto, and then a second lot comprised of the two parcels designated in Schedule B annexed hereto as "Parcel No. 2" and "Parcel No. 3", and then all as a single lot, and finally shall be sold for whichever return is greater, i.e., in such two separate lots if the aggregate of the respective highest bids for such two separate lots is greater than the highest bid for said premises as a single lot, or as a single lot if the highest bid for said premises as a single lot is higher than the aggregate of the respective highest bids for said two separate lots, provided, however, that if the highest bid for the first of such two separate lots is sufficient to make the payments provided in paragraphs 1, 2, and 3 of the next ordering paragraph and from one half

of the balance then remaining to pay in full the amount due to the plaintiff on said judgment entered herein on November 24, 1970 (to wit, $275,863.31, plus interest to January 2, 1971 of $224,726.76, plus interest thereafter to the time of payment at the rate of $44.14 per day) when the proceeds of the sale are paid out as provided in the next ordering paragraph, then such first lot shall be sold for such highest bid, the second of said two separate lots shall not be sold, and the premises shall not be put up or sold all as a single lot; and it is further

ORDERED AND ADJUDGED that the United States Marshal for the Southern District of New York, or his representative, shall execute and deliver to each purchaser a deed of the property sold to such purchaser, upon such purchaser having complied with the terms of the sale, and that the proceeds of such sale shall be deposited with the Clerk of this Court and paid out by him as follows and in the following order of priority:

1. To the appropriate governmental authorities, all unpaid state and local taxes, assessments, water rates, and sewer rates which are charges or liens on the property sold at the time of sale;

2. To the United States Marshal for the Southern District of New York, the costs and expenses incurred by him in connection with the sale;

3. To the plaintiff, United States of America, its costs and disbursements of this action together with (a) an additional allowance of $300.00 for expenses of a title search, pursuant to CPLR § 8301(a)(10); and (b) an allowance of $150.00, pursuant to CPLR § 8302(b);

4. From one half of the balance remaining after completion of the payments described in paragraphs 1, 2, and 3, hereof the following amounts to the following parties in the following order of priority, or so much of such amounts as said one half of such balance will pay:

(a) To the plaintiff United States of America $275,-863.31 plus interest to January 2, 1971 in the amount of $224,726.76 plus interest thereafter to the time of payment at the rate of $44.14 per day, which amount so paid shall be in satisfaction, or, if said one half of such balance is less than the amount then due on said judgment, partial satisfaction, of said judgment entered herein on November 24, 1970;

(b) To the defendant Commercial Bank of Soleure, one half of the amount due, including interest to the date of payment, on its mortgage dated April 24, 1962, and recorded in the office of the Clerk of Westchester County in Liber 6455 Mp 25, Liber 7038 Mp 465, and Liber 7059 Mp 761, which amount due is hereby determined to be $70,000. in unpaid principal balance plus interest to May 31, 1971, of $8,038.35 plus additional interest at the rate of 6% per annum from and after May 31, 1971, to the date of payment;

(c) The balance, if any, to the defendant Walter Kocher.

5. From the other half of such balance remaining after completion of the payments described in paragraphs 1, 2, and 3, hereof the following amounts to the following parties in the following order of priority, or so much of such amounts as said one half of such balance will pay:

(a) To the defendant Commercial Bank of Soleure, one half said amount due including interest to the

date of payment on its said mortgage dated April 24, 1962, and recorded in the office of the Clerk of Westchester County in Liber 6455 Mp 25, Liber 7038 Mp 465, and Liber 7059 Mp 761 plus the amount, if any, by which the fund referred to in paragraph 4 hereof is insufficient to satisfy the full amount to be paid under subparagraph 4(b) hereof, i.e. to satisfy the other half of said amount due, including such interest, on said mortgage;

(b) The balance, if any, to the defendant Rose Kocher.

Either the plaintiff or the Internal Revenue Service may purchase the premises whose sale is decreed in this judgment and if the plaintiff or the Internal Revenue Service so purchases such premises, then such purchaser shall not be required to make any deposit thereon and shall not be required to pay in cash the entire amount bid at such sale, but the United States Marshal for the Southern District of New York, or his representative, shall execute and deliver to such purchaser a deed or deeds of the premises sold upon payment to the Marshal, or his representative, in cash of an amount equal to the aggregate of (a) the amounts described in paragraphs 1 and 2 above, plus (b) an amount equal to one half of the excess of the amount bid over the aggregate of the amounts described in paragraphs 2, and 3, above, plus (c) an amount equal to the amount, if any, by which one half such excess is greater than the maximum amount to be paid to the plaintiff pursuant to paragraph 4(a) above (i.e. is greater than $500,590.07 plus $44.14 per day from January 2, 1971, to the date of such payment), and the balance of the amount bid after making such payment in cash shall be applied against,

and deemed a payment of, the amounts to be paid to the plaintiff pursuant to paragraph 3 above and said paragraph 4(a); and it is further

ORDERED AND ADJUDGED that the United States Marshal for the Southern District of New York shall promptly file his report of the sale with the Clerk of this Court and, upon production of the Marshal's deed to him, each purchaser at the sale shall be let into possession of the property so sold to him; and it is further

ORDERED AND ADJUDGED that each of the defendants and all persons claiming under them after the filing of the notice of pendency are hereby forever barred and foreclosed of all right, title, claim, lien, interest, and equity of redemption, in and to the premises whose sale is decreed in this Judgment, and in and to each and every part thereof, except that nothing herein shall foreclose, bar, limit, or otherwise affect, (a) the rights, liens, claims, or interests, of defendant Commercial Bank of Soleure under its said consolidated mortgage dated July 11, 1959, and recorded in the office of the Clerk of Westchester County in Liber 6088 Mp 314, Liber 6509 Mp 315, and Liber 7059 Mp 754, or (b) the rights, liens, claims, or interests, of said defendant Commercial Bank of Soleure under its said mortgage dated January 8, 1960, and recorded in the office of the Clerk of Westchester County in Liber 6127 Mp 29, Liber 6127 Mp 27, and Liber 7059 Mp 749, or (c) the rights, liens, claims, or interests, of defendant Eric Kocher under his said consolidated mortgage dated March 13, 1957, and recorded in the office of the Clerk of Westchester County in Liber 5768 Mp 3, Liber 6963 Mp 329, and Liber 7059 Mp 766; and it is further

Judgment of the District Court

ORDERED AND ADJUDGED that there is no just reason for delay and that the Clerk of this Court enter Judgment forthwith.

Dated: New York, New York
November 19, 1971.

/s/ CHARLES M. METZNER
CHARLES M. METZNER
U.S.D.J.

Judgment entered this 19th day of November, 1971.

/s/ JOHN LIVINGSTON
JOHN LIVINGSTON
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1031

WALTER KOCHER, a/k/a WALTER A. KOCHER, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The government brought this action for foreclosure of federal tax liens in the United States District Court for the Southern District of New York. The amount of petitioner's accrued tax liability, with interest, was determined to be in excess of $500,000, and petitioner does not contest that finding.[1] Upon the government's motion for partial summary judgment, the court ordered foreclosure on certain property held by petitioner and his wife as tenants in common (Pet. App. 16a-28a). The order permitted sale of the entire property, subject to payment of one-half the net proceeds to petitioner's wife, and also permitted the government as junior lienor to bid at the sale with no restriction on the amount it could offer. The court of appeals affirmed (Pet. App. 1a-13a).

---

[1]References to "petitioner" refer only to Walter Kocher. Petitioner Rose Kocher will be separately referred to as petitioner's wife.

1. Petitioner contends (Pet. 10-12) that Section 7403 of the Internal Revenue Code of 1954, 26 U.S.C. 7403, permits the government to enforce its lien only by selling petitioner's undivided half interest and not by selling the entire property subject to payment over of a share of the proceeds to his wife. But that Section expressly entitles the government "to subject any property, of whatever nature, of the delinquent [taxpayer], or in which he has any right, title, or interest, to the payment of [the unpaid] tax or liability." The court of appeals correctly held, in an opinion on which we rely (Pet. App. 4a-7a), that the statute permits a foreclosure sale of the entire property, notwithstanding any contrary provisions in state law relating to partition of tenancies in common.[2]

2. Petitioner's contention (Pet. 12-15) that the district court erred in permitting the government as junior lienor to bid at the foreclosure sale was answered by the court of appeals (Pet. App. 7a-10a), on whose opinion we primarily rely. We further note that the district court was authorized generally to set such terms and conditions of sale as it deemed appropriate to avoid injustice. See 28 U.S.C. 2001.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

[2]As petitioner points out (Pet. 8-9), the decision below conflicts with *Folsom* v. *United States*, 306 F. 2d 361 (C.A. 5), which permitted a sale only of the taxpayer's undivided interest in a tenancy in common. We believe *Folsom* to be plainly wrong and at variance with the clear language of the statute. Furthermore, no court of appeals has followed *Folsom*, and just two years ago this Court denied certiorari in a case involving the same issue now raised by petitioner. See *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *United States* v. *Overman*, 424 F. 2d 1142 (C.A. 9); *United States* v. *Trilling*, 328 F. 2d 699 (C.A. 7).